ORIGINAL

No. 90-5193

IN THE SUPREME COURT OF THE UNITED STATES

DAWUD MAJID MU'MIN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court violated the petitioner's rights under the sixth and fourteenth amendments by refusing to allow questions on voir dire of potential jurors regarding what the veniremen had read or heard about the crime.
2. Whether the trial court violated the petitioner's sixth and eighth amendment rights by refusing to allow questions on voir dire of potential jurors regarding what the veniremen had read or heard about the crime.
3. Whether the trial court violated the petitioner's sixth amendment right by failing to strike for cause two jurors who indicated that their ability to deliberate impartially would be hampered.
4. Whether the petitioner's trial was rendered fundamentally unfair by the prosecutor's repeated use of and reference to an unrelated conviction of the petitioner.
5. Whether the trial court deprived the petitioner of due process by allowing into evidence statements made by the petitioner during custodial interrogation.
6. Whether Virginia's death penalty statute violates the constitutional prohibition on cruel and unusual punishment.

7. Whether the imposition of the death penalty in this case is violative of the eighth amendment because it was imposed under the influence of passion, prejudice and arbitrary factors.

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The Petitioner, Dawud Majid Mu'Min, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in this case.

OPINION BELOW

The opinion of the Supreme Court in this case is reported and may be cited as Mu'Min v. Commonwealth, 389 S.E.2d 886 (Va. 1990).

JURISDICTION

The judgment sought to be reviewed was entered by the Supreme Court of Virginia on March 2, 1990, and a petition to rehear the case was denied by that court on April 20, 1990. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), the Petitioner having asserted below and herein deprivations of right secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment to the United States Constitution states, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the law.

The sixth amendment to the United States Constitution states, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed[.]

The eighth amendment to the United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Va. Code Ann. § 18.2-31 (1988) states, in pertinent part:

> Capital murder defined; punishment. -- The following offenses shall constitute capital murder, punishable as a Class 1 felony:
>
> . . . .
>
> (c) The willful, deliberate and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;
> (d) The willful, deliberate and premeditated killing

of any person in the commission of robbery while armed with a deadly weapon[.]

Va. Code Ann. § 19.2-264.2 (1983) provides as follows:

> Conditions for imposition of death sentence. -- In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

STATEMENT OF THE CASE

The petitioner was indicted by the Grand Jury for the 31st Judicial District of Virginia for capital murder in violation of Va. Code Ann. § 18.2-31 (1988). Trial was held before a jury from April 17 to April 20, 1989, after which the jury returned a verdict finding the petitioner guilty of murder while he was confined in a state correctional facility or in the custody of an employee thereof, or while in the commission of a robbery while armed with a deadly weapon (Trans. 4/20/89 at 239). Thereafter a sentencing hearing was held before the same jury, whereupon the jury recommended that the punishment be death (Trans. 4/24/89 at 96). On June 12, 1989, after receiving a presentence report, the trial court fixed the petitioner's punishment as death (Trans. 6/12/89 at 53). An appeal was taken to the Supreme Court of Virginia, which issued its decision affirming the judgment March 2, 1990 (App. at 1). A petition for rehearing was filed by the petitioner which was denied by the court on April 20, 1990 (App. at 36).

On September 22, 1988, Gladys Nopwasky was found bleeding on the floor of Dale City Floors, a carpet and flooring business where she worked, in Ashdale Plaza, Prince William County, Virginia (Trans. Vol. I at 222, 264). When police arrived at the scene she was being attended to by two rescue squad units; the police also observed that the shop was in disarray (Trans. Vol. I at 223). The rescue squad personnel found that Mrs. Nopwasky was not breathing and did not have a pulse, although her heart was still beating (Trans. Vol. I at 276). Although she was transported to a hospital, she eventually died. Mrs. Nopwasky's husband, who ran Dale City Floors, testified that on that day the air conditioning unit on the roof serving the shop was being serviced (Trans. Vol. I at 251).

At that time, the petitioner was an inmate at Haymarket Field Unit No. 26 of the Virginia Department of Corrections, serving a 48-year sentence. The morning of September 22, 1988, the petitioner was transported to the Dale City headquarters of the Virginia Department of Transportation, where he was assigned to a work detail and supervised by a Department of Transportation employee. The petitioner testified that at that time he had a screwdriver with a clip that he always carried in his shirt

pocket to fix his television and glasses (Trans. Vol. III at 267-68). He broke for lunch at about 11:30 a.m., and began walking around the grounds there. Eventually he walked over to a wire fence around the perimeter of the grounds, stepped over it, and walked along Interstate 95 toward Dale City and Ashdale Plaza (Trans. Vol. III at 280). At the time, he intended to go to the plaza to price oriental rugs which he was considering as a birthday present for a friend (Trans. Vol. III at 281).

During his walk, the petitioner saw Dale City Floors and went inside to ask about rugs. When he entered, he saw a woman sitting at a desk talking on the telephone. After she finished she came up to the petitioner and asked if she could help him. The petitioner started asking her about the price of oriental rugs and she quoted some prices. The petitioner commented to her that the prices seemed high, and when she appeared angry at this he changed the subject (Trans. Vol. III at 288-89). He then asked about shipping a carpet, and the woman asked him why he would want it shipped. He told her he could not carry away anything he bought there, and after she looked at his clothes she determined that he was a prisoner (Trans. Vol. III at 290). She then began asking the petitioner about what it was like to be locked up and the sexual aspect; the petitioner responded that he just didn't think about it (Trans. Vol. III at 291).

She then asked the petitioner about making love with white women. The petitioner told her to "get the hell out of here,"

after which she spit in his face. He then struck her in the face with his open hand (Trans. Vol. II at 292). She then began screaming and calling the petitioner a "nigger," and as she made another motion toward him he struck her again with the back of his hand (Trans. Vol. II at 293-94). The woman then kicked him in the groin and the petitioner fell to the floor, pulling her down as well. She then kicked herself away from the petitioner and came back at him with a knife, slashing at him. After warding her off, the petitioner grabbed the screwdriver from his shirt pocket and struck her in the chest and neck (Trans. Vol. III at 298). After she fell, the petitioner noticed blood coming from her nose and mouth.

Realizing she was hurt, the petitioner tried to help her by checking her pulse and looking through desk drawers and a pocket-book for something to help her (Trans. Vol. III at 302). He then went to a bathroom in the back of the store and got a wet washcloth, which he held against the wound on her neck (Trans. Vol. III at 303-04). The petitioner left the store using the back door with change he had grabbed from a desk to get some ice (Trans. Vol. II at 305). After walking around trying to figure out what to do, he came back to the store and starting wiping up with a handkerchief the things he could remember touching, and washed his hands. He then went out the back door and went back to the highway department grounds (Trans. Vol. III at 309-10).

Once there, he cleaned up, changed shirts, and threw away the shirt he had been wearing (Trans. Vol. III at 311).

The Commonwealth presented evidence concerning the autopsy of Mrs. Nopwasky, which showed that she had suffered eight stab wounds to the thorax and four stab wounds to the neck area (Trans. Vol. II at 13). It also presented the testimony of Keith Shifflett, an inmate at the Haymarket Correctional Unit. Shifflett stated that on the evening of September 22, 1988 he saw the petitioner in the shower and noticed blood on his body. Shifflett testified that after asking what happened, the petitioner fell on his knees, started crying and talking about having hurt and killed somebody (Trans. Vol. II at 235-36). Robert Owens, an inmate at the Prince William, Virginia, Adult Detention Center, testified for the Commonwealth that he was in the same cell with the petitioner after the petitioner was transferred there in late September 1988. Owens testified that the petitioner told him about the incident at Dale City Floors and that the petitioner told him he had been in the store before and that on the day in question he had gone to the store to rob it. Owens stated that the petitioner told him he struck and stabbed Mrs. Nopwasky with a metal spike after she spurned his advances (Trans. Vol. III at 13-14).

Prior to trial, the petitioner submitted a list of questions to ask members of the jury panel during voir dire. Among them were questions concerning whether the prospective jurors had read

or heard anything about this case from the media, what they had read, seen, or heard, from whom they acquired this information, and whether, what, and with whom they had discussed the case prior to trial. At a pretrial hearing on proposed voir dire questions, the trial court ruled that the petitioner could not ask these questions, stating that he could only question the panel concerning whether they had heard, read or seen anything about the case and whether that information would affect the prospective jurors' impartiality (Trans. 4/14/89 at 57, 58-59). The petitioner objected to this ruling (Trans. 4/14/89 at 58, 59, 74), arguing that he was entitled to ask these questions under the fifth, sixth, eighth and fourteenth amendments to the federal Constitution (Trans. 4/14/89 at 39, 74).

During jury selection, the trial court asked the panel the following question:

> Have any of you acquired any information about the offense, the alleged offense, or the accused from the news media or from any other source?

(Trans. Vol. I at 16.) Sixteen of the panel members indicated in the affirmative (Trans. Vol. I at 16-18). The trial court then asked:

> Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?
>
> Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?

> Have any of you expressed or formed an opinion of the innocence or guilt of the accused?
>
> Is there any person who has already formed an opinion as to the innocence or guilt of the accused?
>
> In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

(Trans. Vol. I at 18-19.) One of the 16 responded in the affirmative to these questions and was dismissed for cause (Trans. Vol. I at 21). Another person was added to the panel, and additional voir dire was completed by each party.

The jury panel then left the courtroom in preparation for additional voir dire in groups of four. After they left, the petitioner moved to strike for cause all those jurors who had indicated they had acquired information about the case (Trans. Vol. I at 51-52). The petitioner asserted that under the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution he was entitled to question those jurors who stated they did have some knowledge of the case specifically about what it was they knew, and that the fact that they indicated they could be impartial was not enough to satisfy the constitutional requirements. The trial court overruled the motion (Trans. Vol. I at 52-53). The petitioner then submitted in further support of this motion newspaper articles concerning the case (Trans Vol. I at 54), and proffered the testimony of Mark Woolverton, a police

department spokesperson, who would have testified that he made statements to the press concerning the petitioner at the direction of the Commonwealth Attorney's office. The court again denied the motion and the request for Woolverton's testimony (Trans. Vol. I at 56-57).

Seven of the original 15 on the panel who answered that they had heard, read, or seen something about the case were eventually seated on the panel after strikes for cause and peremptory strikes (Trans. Vol. I at 16-18, 197).[1] One other person, Paul Tsou, who was placed on the panel after a strike for cause and eventually chosen as a juror, indicated during questioning that he had previously heard and discussed the case with someone (Trans. Vol. I at 25, 197).

On appeal, the Supreme Court of Virginia held that a defendant may not, as a matter of right, question prospective jurors about what they had previously read, heard, or seen about the case. It ruled that a defendant only has a constitutional right to know whether a prospective juror, in reliance on the information previously obtained, has formed an opinion and whether the juror can stand indifferent in the cause (App. at 11). A dissenting opinion written by Justice Whiting and joined by two other justices stated that it was manifest error for the trial court to refuse to allow any questions necessary to establish a

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[1]These included Carrington Boothe, Albert Runion, Sheila Walters, John Taylor, Rita Wolfe, Evelyn Thorpe, and Sandra Dame.

factual and objective basis for assessing juror impartiality, especially in light of the large amount of pretrial publicity engendered by this case (App. at 26). The dissent stated that the defendant had a constitutional right under the sixth and fourteenth amendments to the United States to address the "content" questions to the prospective jurors (App. at 29-30). The petitioner filed a petition for rehearing on this issue before the Virginia appellate court, which petition was denied (App. at 40).

During voir dire of the panel, the petitioner also moved to strike Alexandrina Santiago and Gregory Dailey. Ms. Santiago indicated that she knew the victim personally and was on a first name basis with her (Trans. Vol. I at 102-03). The petitioner argued that, despite her statements that she could be objective, Santiago's relationship with the victim created a substantial danger she could not deliberate impartially (Trans. Vol. I at 107-08). The trial court summarily denied this motion and the petitioner excepted (Trans. Vol. I at 109). Dailey stated, in response to a question of whether jury service would be of any undue hardship, that he worked for a small company and his absence would jeopardize its business (Trans. Vol. I at 26). Dailey also stated that his absence would hamper his business financially and that it would rush and hamper his deliberations (Trans. Vol. I at 88). The petitioner moved to strike Dailey for cause, but the trial court refused the motion stating that he did

not hear Dailey state he would be rushed (Trans. Vol. I at 95-96).

The Virginia Supreme Court found no merit to the assignments of error in failing to strike Santiago and Dailey, ruling that their responses fully supported the trial court's conclusion that they were qualified to sit on the jury (App. at 14).

Prior to trial, the petitioner brought a motion in limine to prevent the Commonwealth from making references to the nature or number of crimes of which the petitioner had been previously convicted (Trans. 4/14/89 at 16-17). The trial court denied this motion, ruling that because the Commonwealth was required to prove that the petitioner was confined in a state correctional institution in order to prove the crime charged in the indictment, it could offer proof of nature and number of crimes of which the petitioner had been convicted (Trans. 4/14/89 at 29-30). At trial, the Commonwealth was allowed to introduce testimony from a Department of Corrections employee that the petitioner was serving a 48-year sentence for first-degree homicide at the time of the crime charged (Trans. Vol. II at 99). An order of conviction for first-degree homicide was also admitted by the trial court (Trans. Vol. III at 6-7).

On appeal, the Virginia Supreme Court ruled that any error in admitting the evidence of other crimes was harmless. It held that because the petitioner had admitted the fact that he was serving a sentence for homicide in an out-of-court statement made

to investigators which was admitted at trial, any error in allowing evidence of the prior crime was not reversible error (App. at 16).

The petitioner also made a pretrial motion to suppress two of his statements made during custodial interrogation on September 30 and October 1, 1988. At a hearing on this motion, Officer David Watson, who questioned the petitioner, testified that he advised the petitioner of his Miranda warnings on each occasion (Trans. 1/30/89 at 21, 25). He also admitted that he had brought up the evidence police had obtained a number of times and that the petitioner did not have an attorney at the time of questioning (Trans. 1/30/89 at 27-28). The petitioner testified that during this questioning he was tired and frustrated, which caused him to say things during the interview he wouldn't have said otherwise (Trans. 1/30/89 at 32-33). After this testimony, the trial court ruled that the petitioner understood what was going on at the time of the questioning and denied the motion to suppress the two statements (Trans. 1/30/89 at 51-52).

The Supreme Court of Virginia upheld this ruling, stating that the transcript of the police questioning did not reveal any evidence of coercion, and that the questioning was done after the petitioner had been given his Miranda rights (App. at 7).

Prior to trial, the petitioner submitted a motion to dismiss the capital murder indictment on the ground that Virginia's capital sentencing statute violates the eighth and fourteenth amend-

ment in that (1) the statutory "vileness" and "future dangerousness" predicates offer no guidance to the jury in determining whether to impose the death penalty, (2) use of "future dangerousness" violates the prohibition on double jeopardy, (3) the death penalty itself violates the prohibition of cruel and unusual punishment, and (4) Virginia does not provide meaningful appellate review of death sentences (Trans. 4/7/89 at 5). The trial court summarily denied the motion, and the petitioner excepted (Trans. 4/14/89 at 11). On appeal, the Supreme Court of Virginia also summarily upheld the constitutionality of the Virginia statute based upon other cases it had decided (App. at 5).

On appeal, the petitioner argued that the death sentence was imposed under the influence of passion, prejudice and other arbitrary factors. In addition to what transpired at trial, the petitioner also pointed out that during argument over the admissibility of evidence at the sentencing hearing, the trial court made comments questioning the relevancy of certain evidence submitted by the petitioner (Trans. 4/21/89 at 154). The Virginia Supreme Court upheld the validity of the death sentence, and held that the trial court's remark was not prejudicial, because it might not have been heard by the jury and the evidence was admitted in any event (App. at 19).

REASONS FOR ALLOWING THE WRIT

I. THE PETITIONER WAS DENIED HIS RIGHT TO AN IMPARTIAL JURY WHEN THE TRIAL COURT REFUSED TO ALLOW QUESTIONING OF PROSPECTIVE JURORS CONCERNING WHAT THEY HAD PREVIOUSLY HEARD OR READ ABOUT THE CASE.

Despite the petitioner's repeated attempts, the trial court refused to allow him to question the prospective jurors about precisely what they had read, seen, or heard about the case prior to the trial. Instead, during voir dire questions were only asked about whether the jurors had read, heard, or seen anything about the case, and if so, whether that would impair their ability to decide the case impartially. The record shows that eight of those who were actually seated on the jury that convicted the petitioner and sentenced to death had read or heard something about the case, but is silent as to the content of the pretrial publicity to which they were exposed.

The failure of the trial court to allow the petitioner to question the prospective jurors about the content of the publicity to which they had been exposed deprived him of his sixth amendment right to an impartial jury, made applicable to the states by the fourteenth amendment. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). The sixth amendment and the due process clause mandate not only the formality of a jury trial but also that the jury be impartial. Ristaino v. Ross, 424 U.S. 589, 595

n.6 (1976). The constitutional standard for jury impartiality is whether he can lay aside his opinion and render a verdict based on the evidence presented. Patton v. Yount, 467 U.S. 1025, 1037 n.12 (1984).

Although the trial court applied this standard in assessing whether those jurors who had heard, read or seen something about the case were qualified, still its failure to allow questioning concerning precisely what they had read or heard frustrated the petitioner's ability to obtain a fair jury. As pointed out in Irvin v. Dowd, supra, 366 U.S. at 728, "[n]o doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father." More recently, this Court stated that a juror's assurances that he is equal to the task of being impartial cannot be dispositive of his rights, and "it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'" Murphy v. Florida, 421 U.S. 794, 800 (1975) (quoting Irvin v. Dowd, supra, 366 U.S. at 723).

Thus, the fact that jurors state they would stand impartial in the cause and not be affected by pretrial publicity cannot be deemed sufficient to guarantee the defendant's right under the sixth amendment. The defendant still must be free to show that the prospective juror possesses information and harbors feelings that would render him partial. Murphy v. Florida, supra, 421

U.S. at 794. The Supreme Court of Virginia's determination that the defendant does not have a constitutional right to pose questions that examine precisely what information the prospective jurors have been exposed to is simply at odds with this Court's decisions establishing that the defendant is entitled to probing voir dire to determine "possible biases, both known and unknown, on the part of potential jurors." McDonough Power Equipment v. Greenwood, 464 U.S. 548, 554 (1984).

Indeed, this Court's decisions indicate that the questioning of jurors as to the content of the prejudicial information to which they have been exposed is not merely desirable but necessary in establishing whether they are impartial or not. In Wainwright v. Witt, 469 U.S. 412, 423 (1985), this court clarified the standard for excluding jurors based upon their views of capital punishment. It was stated in the course thereof that "[a]s with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." Id. at 423. Similarly, in Dobbert v. Florida, 432 U.S. 282, 302-03 (1977), a defendant's claim that his right to an impartial jury was undermined by the pretrial publicity of his case was rejected because it rested solely upon the quantum of media publicity. The opinion noted that the defendant pointed to no specific portion of the record, particularly voir dire, which would require a finding that the

method of juror selection or character of the jury was constitutionally unfair. Id. at 303; see also Patton v. Yount, supra, 467 U.S. at 1038 (there must be fair support in the record for the state court's conclusion that the jurors would be impartial).

These cases demonstrate that establishing either that the trial itself was impermissibly affected by pretrial publicity or that individual jurors were prejudiced by their pretrial exposure to information about the case must be on the basis of specific voir dire questions and answers appearing on the record. Yet the trial court in the instant case prevented the petitioner from establishing such prejudice as to members of the jury panel by prohibiting questions concerning the content of the information to which they had been exposed. As noted above, the determination of a juror's impartiality cannot be made solely on the basis of prospective juror's assurance that he or she would be impartial. Murphy v. Florida, supra, 421 U.S. at 800. The petitioner here was entitled to go beyond the trial court's perfunctory questioning concerning the jurors' pretrial exposure to information about the case and ask questions that would allow him to determine whether the information the jurors obtained rendered them partial.

The constitutional necessity of the content questions proffered by the petitioner is supported by the decisions of the lower federal courts. For example, in United States v. Affleck,

776 F.2d 1451, 1455 (10th Cir. 1985), the court noted that the determination of whether jurors harbor prejudices against the defendant is normally accomplished through voir dire, but held that "[i]t is not . . . enough to ask a juror the stock questions, 'have you formed an opinion as to the accused's innocence or guilt' or 'will you be able to determine guilt based only on the evidence presented?'" It then cited Irvin v. Dowd, supra, and Murphy v. Florida, supra, for the proposition that prospective jurors' assurances that they are impartial is not enough, and the defendant must be allowed to show the existence of partiality on their part through an examination of all the circumstance. Although the sufficiency of the voir dire was upheld there, this was only after the court found that the prospective jurors had completed a questionnaire asking detailed questions about their knowledge of the case's participants and surrounding events and that the parties were allowed to probe the jurors about any troublesome matters. United States v. Affleck, supra, 776 F.2d at 1451.

Similarly, in Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968), the court reversed a conviction where the trial court had questioned prospective jurors concerning whether they had heard or read anything about the case but refused to allow the defendant to question them further about what information they had been exposed to. The court held that "in the absence of examination designed to elicit answers which provide an objective

basis for the court's evaluation, 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient to test that impartiality.'" Id. at 638 (quoting United States ex rel. Bloeth v. Denno, 313 F.2d 364, 372 (2d Cir.), cert. denied, 372 U.S. 978 (1963)). Although the court conceded that jurors need not have read or heard nothing about a case, "whether a juror can render a verdict based solely on evidence adduced in the courtroom should not be adjudged on the juror's own assessment of self-righteousness without something more." Silverthorne v. United States, supra, 400 F.2d at 639 (emphasis in original). Because the trial court did not determine what information the prospective jurors had accumulated prior to trial, it had no way to objectively assess their impartiality, thereby prejudicing the defendant's right to a fair jury. Id. at 638.

And in Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985), the court reversed the district court's decision denying Jordan a writ of habeas corpus, finding that the voir dire at Jordan's state trial was insufficient to protect his right to an impartial jury under the sixth amendment. After noting that Jordan's case had been the subject of much publicity, the court found that the trial court's denial of individualized voir dire to determine whether potential jurors were biased by that publicity, and only asking whether they had previously formed an opinion and could act impartially, violated Jordan's right to an impartial jury.

It held that the law requires that jurors must be questioned as to whether they were exposed to pretrial publicity, and if so, further inquiry into the nature of the exposure is required. Id. at 1281. The Jordan court relied in part on the decision in United States v. Davis, 583 F.2d 190 (5th Cir. 1978), where a defendant was again prevented by the trial court from questioning potential jurors about the content of any publicity to which they were exposed, relying only on responses from the jurors that they could be impartial. In reversing, the Davis court found such questioning to be "cursory" and held:

> The court should have determined what in particular each juror had heard or read and how it affected his attitude toward the trial, and should have determined for itself whether any juror's impartiality had been destroyed.

Id. at 196; see also United States v. Dellinger, 472 F.2d 340, 374-75 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973) (where there is substantial pretrial publicity concerning a criminal case, trial court is obligated to conduct individualized voir dire concerning the impact of the publicity upon the potential jurors).

The decisions clearly indicate that the kind of perfunctory voir dire allowed to the petitioner in this case is insufficient to protect an accused's right to an impartial jury and violates his sixth amendment rights. As pointed out in the dissenting opinion below, the record discloses an unusual amount of pretrial publicity, especially since it involved the killing of a local

resident allegedly by a convict working outside prison for the Department of Transportation (App. at 26-27). In light of the notoriety of the case, it was improper for the trial court here to rely solely upon the jurors' assertions that they could be impartial since "[t]he juror is poorly placed to make a determination as to his own impartiality." United States v. Davis, supra, 583 F.2d at 197. The petitioner was entitled to voir dire of the prospective jurors concerning what they had read and heard about the case, because it is only through such questioning that an objective determination as to their prejudice, vel non, can be determined. Silverthorne v. United States, supra, 400 F.2d at 638.

Despite the existence of these decisions mandating "content" questions on voir dire as a matter of a defendant's sixth amendment right, the court below held that such questions did not have to be asked because the prospective jurors were asked whether they could stand indifferent in the cause. In support, the Supreme Court of Virginia cited only United States v. Haldeman, 559 F.2d 31, 67-68 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977), which held that it was not necessary to ask "content" questions. However, as pointed out by the dissent below (App. at 34-35), reliance on the Haldeman decision is misplaced. First, the decision in Haldeman explicitly agreed that certain standards of criminal justice mandate that veniremen be questioned concerning what they have read and heard about the case and how it has

affected their attitudes toward the trial. 559 F.2d at 69. Secondly, that court also stated that it would have been error for the trial court to rely solely upon the prospective jurors' assurances that they could be fair, and that the trial court there asked other questions concerning how close they had followed the Watergate case and their sources of information. Id. at 67 n.51. In this case, the trial court had no objective facts upon which to assess a juror's bias and did rely solely upon their statements that they would be fair.

Therefore, the Supreme Court of Virginia erred in relying on the Haldeman decision and in finding that the petitioner had not been deprived of his sixth amendment right. That right was violated by the trial court's refusal to allow questioning of the prospective jurors concerning what they had been exposed to in the way of pretrial publicity. The trial court's reliance upon the jurors' statements of impartiality was constitutionally inadequate to assure the petitioner's right to a fair trial and requires that the petitioner's conviction be reversed.

II. THE PETITIONER WAS DENIED HIS RIGHT TO AN IMPARTIAL JURY IN THE SENTENCING PHASE WHEN TRIAL COURT REFUSED TO ALLOW QUESTIONING OF PROSPECTIVE JURORS CONCERNING WHAT THEY HAD PREVIOUSLY HEARD OR READ ABOUT THE CASE.

The trial court's error in not allowing questioning of the prospective juror's about what information they had been exposed to prior to the trial not only deprived the petitioner of his

sixth amendment right, but also his eighth amendment right, which is applicable because this was a capital murder prosecution and he was sentenced to death. This Court has recognized "that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-99 (1983). In this case, that higher degree of scrutiny should be applied to the selection process of the petitioner's jury which not only found him guilty of capital murder, but recommended that the death penalty be imposed. As noted above, the trial court did not allow the petitioner to question the prospective jurors about what they had read and heard about the case, thereby allowing jurors to be seated who were not demonstrably impartial or free of preconceived notions about the petitioner.

That this inadequate voir dire violated the petitioner's right to be free from an arbitrary and capricious jury decision to impose the death penalty is demonstrated by this Court's decision in Turner v. Murray, 476 U.S. 28 (1986). There, a judgment imposing the death penalty under Virginia's capital sentencing scheme was overturned where the trial court refused to allow voir dire questioning of the jury panel concerning their racial prejudices, where it was alleged that the black defendant killed a white person. This Court noted not only that a greater degree of scrutiny is demanded of cases involving the death penalty, but also that Virginia's death penalty system gives the jury greater

discretion than other systems that have been considered by the Court. Id. at 34. It also was stated that the risk of prejudice infecting a capital sentencing proceeding "is especially serious in light of the complete finality of the death sentence." Id. at 35. Although the conviction was not overturned, the death sentence was because of the risk produced by the inadequate voir dire. Id. at 37-38.

The inadequate voir dire in the instant case, as discussed in Part I, supra, also requires that at the very least the sentence of death imposed upon the petitioner be reversed. As pointed out in the Turner decision, the risk of an arbitrary or capricious imposition of the death penalty is heightened where the voir dire allowed inadequately screens jurors for prejudice. This is especially true under Virginia's death penalty scheme which grants wide discretion to the jury. Because of this unacceptable risk of arbitrary sentencing and the greater degree of scrutiny applicable here, the sentence imposed should be reversed because of the trial court's inadequate protection of the petitioner's right to an impartial jury under the sixth, eighth and fourteenth amendments.

III. THE TRIAL COURT DEPRIVED THE PETITIONER OF HIS RIGHT TO AN IMPARTIAL JURY WHEN IT FAILED TO STRIKE TWO JURORS FOR CAUSE.

The principles discussed above relating to the petitioner's constitutional right to an impartial jury also were violated when

the trial court refused the petitioner's motions to strike two jurors for cause. The first, Ms. Santiago, stated that she knew the victim and patronized her store; indeed, Ms. Santiago referred to the victim by her first name during voir dire (Trans. Vol. I at 102-03). The second, Mr. Dailey, indicated that because of his employment with a small business and the time jury service would take up, he would be hampered in his deliberations and he would feel rushed (Trans Vol. I at 26, 88).

Again, the sixth amendment and the due process clause mandate not only the formality of a jury trial but also that the jury be impartial. Ristaino v. Ross, supra, 424 U.S. at 595 n.6. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." Irvin v. Dowd, supra, 366 U.S. at 722. The central inquiry in the determination of whether a juror should be excused for cause is whether the juror harbors some feeling that would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, supra, 469 U.S. at 424.

In this case, both Santiago and Dailey indicated that their ability to decide the cause impartially would be hampered, in one case because of the personal relationship Santiago had with the victim and in the other Dailey's feeling that he would be rushed

in deliberating on the case. While neither Santiago nor Dailey was eventually seated on the jury, the trial court's retention of them on the jury panel forced the petitioner to use peremptory challenges that would not otherwise have been used. The right of peremptory challenges is one of the most important of rights secured to the accused, and a denial or impairment of that right is reversible error without a showing of prejudice. Swain v. Alabama, 380 U.S. 202, 219 (1965). The trial court's action resulted in an impairment of the petitioner's right to peremptory challenges and requires that the judgment below be reversed.

IV. THE TRIAL COURT DEPRIVED THE PETITIONER OF HIS FUNDAMENTAL RIGHT TO A FAIR TRIAL BY ALLOWING EVIDENCE OF UNRELATED CRIMES.

Despite the petitioner's pretrial motion to prevent the Commonwealth from introducing evidence of prior crimes, the Commonwealth was allowed to make repeated references to the fact that the petitioner had been convicted of murder in 1973. Even though the Commonwealth was required to prove that the petitioner was incarcerated at the time of the crime alleged under Va. Code Ann. § 18.2-31(c) (1988), it was possible to prove that the petitioner was a prisoner without making reference to the fact that he had previously been convicted of murder. This could have been done either by records indicating merely the fact of incarceration or by testimony from correction officials stating that the petitioner was a prisoner on the date of the alleged offense.

Because the only relevant inquiry under the offense charged was whether the petitioner was incarcerated, not the basis for that incarceration, evidence of the fact that he had been convicted of murder was wholly irrelevant and could serve only to unfairly prejudice him in the eyes of the jury. This Court has recognized that the introduction of evidence of prior unrelated crimes by a criminal defendant may be so extremely unfair as to violate the fundamental conceptions of justice embodied in the due process clause of the fourteenth amendment. Dowling v. United States, 110 S. Ct. 668, 674-75 (1990). Where the prosecution is allowed to introduce such evidence under circumstances where it is without basis and wholly irrelevant, due process is violated. Foster v. Watkins, 423 F. Supp. 53, 55 (W.D.N.C. 1976), aff'd, 570 F.2d 501 (4th Cir. 1978).

The circumstances here are of the type that deprived the petitioner of a fundamentally fair trial. Evidence of his prior conviction for murder served no real purpose at trial other than to convey to the jury that he was a bad person or that he had a character trait that made him prone to violence. That purpose is clearly irrelevant and improper. See Fed. R. Evid. 404(b) (evidence of other crimes is inadmissible to prove the character of the person). Evidence of the other crime irreparably and unfairly prejudiced the petitioner, and reversal of the conviction is required.

V. THE PETITIONER WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS WHEN THE TRIAL COURT ALLOWED INTRODUCTION OF STATEMENTS HE MADE DURING CUSTODIAL INTERROGATION THAT WERE INVOLUNTARY.

Even though the petitioner had been read his Miranda rights prior to speaking to Officer Watson and did not specifically invoke either his right to remain silent or to have an attorney present, the fact that Miranda warnings were read is not dispositive of the admissibility of custodial statements made by a criminal defendant. It is now well established that a defendant's statement that is not given as a free and rational choice violates due process and is inadmissible at trial. Colorado v. Connelly, 479 U.S. 157 (1986); Townsend v. Sain, 372 U.S. 293 (1963). Even assuming no violation of the prophylactic Miranda rule is apparent, the statement is still inadmissible if it is involuntary in that it is not the product of a rational intellect and a free will. Mincey v. Arizona, 437 U.S. 385, 397-98 (1978).

The hearing on the petitioner's motion to suppress the statements he gave to Owens shows that those statements were not the product of the petitioner's free will. The petitioner testified that he was tired and frustrated at the time of the questioning and that this caused him to say things he would not have otherwise said (Trans. 1/30/89 at 32-33). In Ashcroft v. Tennessee, 322 U.S. 143, 153-54 (1944), a defendant's statements made after he had been held incommunicado and questioned repeatedly were not voluntarily given because of the fatigue the defendant was under at the time of the statements. The petitioner

here was questioned under similar circumstances; he was incarcerated at the time of the statements and was tired and subject to the suggestions of Owens.

Moreover, the transcript of the statements indicates that Owens played upon the petitioner's fatigue by falsely representing that he was trying to help the petitioner and that he already had information proving the petitioner's guilt. In Spano v. New York, 360 U.S. 315, 323-24 (1959), this Court condemned the police practice of posing as a false friend of the subject of interrogation merely for the purpose of extracting an incriminating statement from him. Owens engaged in precisely the kind of conduct that Spano condemned. When this police overreaching is combined with the mental and physical state of the petitioner at the time of his statements, the inescapable conclusion is that the statements were not the result of a voluntary act. Although the statements themselves were not incriminating, they were at variance from his trial testimony and surely prejudicial to the petitioner's case by indicating that he had lied in the past. As such, the admission of the statements was prejudicial and the error in admitting them is cause for reversing the judgment below.

VI. THE PETITIONER'S DEATH SENTENCE MUST BE REVERSED BECAUSE VIRGINIA'S DEATH PENALTY SCHEME IS VIOLATIVE OF THE EIGHTH AMENDMENT.

A fundamental teaching of this Court's decisions involving death penalty statutes is that the scheme employed by the state for invoking this ultimate of penalties must not allow a jury to make the determination without guidance. Sentencers may not be given unbridled discretion in determining the fate of those charged with capital crimes, and statutes must be structured to prevent the penalty from being imposed in an arbitrary and unpredictable fashion. California v. Brown, 479 U.S. 538, 545 (1987); Gregg v. Georgia, 428 U.S. 153, 197 (1976).

This fundamental tenet is violated by the statutory scheme under which the petitioner was sentenced. Va. Code Ann. § 19.2-264.2 (1983) allows the jury to impose the death sentence if it finds that the defendant's "conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman[.]" This "vileness" predicate gives a Virginia jury essentially no guidance in determining which crimes should be punished by death. This conclusion is supported by this Court's decision in Maynard v. Cartwright, 108 S. Ct. 1853 (1988), where Oklahoma's statutory scheme allowing the imposition of the death penalty upon a jury finding that the crime was "especially heinous, atrocious or cruel" was struck down as violative of the eighth amendment's requirement that jury discretion be suitably restricted. There is no reasonable distinction be-

tween the language used in the unconstitutional Oklahoma statute and the "vileness" predicate of Virginia's statute. In both cases, there is still the unbridled discretion condemned by the Constitution, and for that reason the petitioner's death sentence should be reversed as it was obtained under an unconstitutional statute.

The same argument applies with respect to the other predicate contained in Va. Code Ann. § 19.2-264.2, "future dangerousness." Nothing in either the statutory or case law of Virginia provides guidance as to the standard of proof necessary to support a finding that a defendant, based upon his prior record, poses a continuing danger to the community. The jury is given open-ended discretion in deciding when the proof has risen to a level necessary to establish the fact of future dangerousness. Without providing meaning and guidance, the sentencing scheme allows the jury to arbitrarily and capriciously impose the ultimate punishment of death, a result that violates the eighth amendment and requires reversal of the petitioner's sentence.

The Virginia statutory scheme for imposing the death penalty also is unconstitutional because it fails to allow for a meaningful avenue of appellate review of the imposition of that penalty. As pointed out in Pulley v. Harris, 465 U.S. 37, 44 (1984), nearly every state that has adopted a death penalty scheme has also mandated automatic appellate review of a judgment imposing the death penalty. Indeed, such review is necessary under the eighth

amendment to assure that the death penalty is not imposed in an arbitrary manner. Gregg v. Georgia, 428 U.S. 153, 198 (1976). Virginia law also provides for automatic review of death sentences under Va. Code Ann. § 17-110.1 (1988). The Supreme Court of Virginia is to review any sentence of death to determine whether it was "imposed under the influence of passion, prejudice or any other arbitrary factor," and whether it is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Id., § 17-110.1(C).

However, unlike the appellate review provided for in other jurisdictions, Virginia's sentencing scheme does not provide for meaningful review. For example, in Pulley, supra, 465 U.S. at 53, it was noted that there was a requirement that the jury specify the special circumstance justifying imposition of the death penalty so that the appellate court could adequately determine whether the death penalty was actually justified. And in Proffitt v. Florida, 428 U.S. 224, 251 (1976), Florida's death penalty scheme was upheld where meaningful appellate review was made possible by the requirement that the trial judge justify the imposition of the death penalty with written findings.

Virginia's scheme provides no such safeguards to assure that the death penalty was not arbitrarily applied. There is no requirement that the trial court or jury specify precisely which of the statutory aggravating factors was relied upon in determining to impose the death penalty. Absent such a finding, there is no

way for the Virginia Supreme Court to conduct the meaningful review of the sentence mandated by the eighth amendment.

Additionally, the review that is mandated by Va. Code Ann. § 17-110.1 is conducted in a wholly cursory and arbitrary manner. An examination of Virginia Supreme Court cases conducting this statutory review usually state in only a vague and general manner that the sentence was neither imposed under passion or prejudice or based upon other arbitrary factors. This certainly is not the kind of in-depth, meaningful review contemplated by the eighth amendment.

For these reasons, Virginia's death penalty scheme is unconstitutional and the petitioner's sentence under that scheme should be reversed.

V I. THE IMPOSITION OF THE DEATH SENTENCE IN THIS CASE IS UNCONSTITUTIONAL BECAUSE IT WAS THE RESULT OF PASSION, PREJUDICE, AND OTHER ARBITRARY FACTORS.

The petitioner's sentence of death in this case also should be reversed because its imposition was the result of arbitrary factors. As pointed out in parts I and II, supra, there was extensive pretrial publicity resulting in prejudice to the petitioner and a trial filled with passion against him. This prejudice was not weeded out by the trial court and, in light of the greater scrutiny applicable to death sentences, mandates reversal of the petitioner's sentence.

Additionally, the sentencing phase of the trial was infected by the court's comments upon relevant evidence submitted by the petitioner in opposition to the death penalty. The trial court derided the relevancy of a Virginia Department of Transportation regulation offered by the petitioner, which effectively conveyed to the jury that the petitioner's case in opposition to the death penalty was not worthy of respect. Although the Supreme Court of Virginia indicated that the comment was harmless because it might not have been heard by the jury, there is nothing in the transcript indicating that the comment was not made in open court for all therein to hear. The qualitative difference in the death penalty and the corresponding need for greater reliability in the decision-making process cannot tolerate the kind of prejudice injected into the proceedings by the trial court. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Therefore, the death penalty imposed upon the petitioner here must be reversed.

CONCLUSION

For the foregoing reasons, the petitoner, Dawud Majid Mu'Min, respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia convicting him of murder and sentencing him to death.

Respectfully Submitted,

Dawud Majid Mu'Min

Dawud Majid Mu'Min
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Attorney Pro Se

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 20th *day of* April, 1990.

Dawud Majid Mu'Min, a/k/a, etc., Appellant,

against Record No. 890899
Circuit Court No. 23103

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 2nd day of March, 1990 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 2nd *day of* March, 1990.

Dawud Majid Mu'Min,
a/k/a David Michael Allen, Appellant,

against Record No. 890899
Circuit Court No. 23103

Commonwealth of Virginia, Appellee.

Upon an appeal of right from a judgment rendered by the Circuit Court of Prince William County on the 12th day of June, 1989.

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgment appealed from. Accordingly, the judgment is affirmed.

It is ordered that the said circuit court allow counsel for the appellant on the merits and on the issue of ineffective assistance of counsel, each a fee of $1,550 for services rendered the appellant on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Clerk

Present: Carrico, C.J., Compton, Stephenson, Russell, Whiting, and Hassell, JJ., and Poff, Senior Justice

DAWUD MAJID MU'MIN A/K/A
DAVID MICHAEL ALLEN

v. Record No. 890899

COMMONWEALTH OF VIRGINIA

OPINION BY SENIOR JUSTICE RICHARD H. POFF
March 2, 1990

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY
H. Selwyn Smith, Judge

Dawud Majid Mu'Min, also known as David Michael Allen, was tried by a jury on an indictment charging capital murder. Invoking the three grounds defined in subsections (c), (d), and (e) of Code § 18.2-31 (Repl. Vol. 1988) (now, subsections (3), (4), and (5) of § 18.2-31), the indictment alleged that the killing had been committed while the accused "was a prisoner confined in a State or local correctional facility or while in the custody of an employee thereof, or while in the commission of robbery, while armed with a deadly weapon, or during the commission of or subsequent to rape".

The verdict form submitted to the jury in the first phase of the bifurcated trial quoted the three grounds alleged in the indictment and instructed the jury to "strike out" any ground "that you do not find beyond a reasonable doubt." The jury marked through the third ground and returned a guilty verdict based upon the first and second grounds.

The verdict form submitted to the jury in the penalty phase of the trial quoted the language of Code § 19.2-264.4(C) defining the "dangerousness" and the "vileness" predicates and

instructed the jury to strike out the language of either predicate "if either you do not unanimously find." The jury, "having considered the evidence in mitigation of the offense," returned the form unaltered and "unanimously fix[ed] . . . punishment at death." After reviewing the probation report required by Code § 19.2-264.5, the trial court entered judgment confirming the conviction and imposing the penalty fixed by the jury. We have consolidated the defendant's appeal of the conviction with the automatic review of the sentence, Code § 17-110.1(A) and (F), and accorded both priority on our docket, Code § 17.2-110.2.

I. THE EVIDENCE

Most of the facts and circumstances related to the attack which led to the victim's death are drawn from the defendant's testimony at trial. Convicted in 1973 of first degree murder and sentenced to a term of 48 years, the defendant was an inmate at Haymarket Field Unit #26. On the morning of September 22, 1988, he and five other prisoners were transported to the Virginia Department of Transportation's Dale City Headquarters (VDOT) where they were assigned to a work detail supervised by a VDOT employee.

During the course of his work that morning, the defendant damaged the point of a screwdriver which he repaired with the use of a bench grinder. At the same time he used the grinder to sharpen a short piece of metal (sometimes referred to as a "highway spike") into the shape of a screwdriver, added a wooden handle, and attached the device to his shirt pocket with a

holder fashioned from a paper clip. When the work crew suspended operations for lunch, the defendant crossed the perimeter fence and walked along Interstate Route 95 a distance of approximately a mile to Ashdale Plaza, a shopping center. There, he entered Dale City Floors, a retail carpet store, and inquired of the operator, Mrs. Gladys Napwasky, about oriental carpets.

The defendant challenged the prices she quoted, and a heated argument ensued.[1] According to the defendant, she "started screaming . . . nigger this and nigger that" and "spit in [his] face." The defendant slapped her with his open hand, and she kicked him in the genitals. As the defendant fell to the floor, he "caught the top part of her pants" and pulled them "down right . . . by the thighs." Mrs. Napwasky "slashed" at him with a steak knife. The defendant "pushed her off and . . . went straight for the shirt pocket and . . . came up and hit her in the chest and hit her up in the neck." "Blood was coming from the nose and mouth and . . . a trickle of blood . . . from the neck." The defendant "checked her pulse to make sure she was okay", placed a wet washcloth on the neck wound, and "took the sleeve of [his] shirt and . . . wiped her face." While searching for a first aid kit, the defendant found four dollars in coins. He explained that he left the store intending to use the coins to purchase ice from a vending machine located in the

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[1]Other evidence showed, however, that Dale City Floors had not stocked oriental carpets for eleven years.

shopping center to apply to his victim's wounds. Changing his mind, he re-entered the store and "started wiping all the things that [he] could remember that [he] had touched." When he returned to the VDOT, he washed blood from his shoes, took off his bloody shirt, "put it in the trash bag and threw it in the trash can." He discarded the weapon used in the attack along the highway. The defendant testified that he had not raped his victim.

A customer of the carpet store found Mrs. Napwasky lying on the floor and called a rescue squad. A paramedic testified that he had found her "face up on her back on the floor in a pool of blood that was around her head and upper body"; that she was naked below the waist and her blouse and brassiere had been pulled above her breasts; that although her heart was beating, "she was breathless and pulseless" because there was "no . . . fluid for it to actually pump." The autopsy report identified 16 cuts and puncture wounds on the face, neck, chest, and left arm. A neck wound, three inches deep, severed the jugular vein. A wound four inches deep in the left chest cavity penetrated the left lung. Evidence of numerous "blunt-force trauma injuries" was found on her face and forehead. The victim's genital area was undisturbed.

The Commonwealth introduced the testimony of several of the defendant's fellow inmates concerning his conduct following arrest. One witness testified that the defendant had fallen to his knees, crying and saying that he had killed somebody. Another said that the defendant had told him that he had

murdered and robbed his victim. A third prisoner testified that the defendant had conceived an escape plan involving the use of violence. In a search of the defendant's cell while he was awaiting trial, the authorities found a piece of metal taken from a typewriter page stand and an ear bracket from a pair of spectacles. Both appeared to have been sharpened.

II. PRE-TRIAL ISSUES

A. Constitutional Challenges

The defendant filed a motion to dismiss the indictment on the ground that the capital murder statutes are unconstitutional. The trial court rejected the several challenges articulated in a detailed memorandum. The defendant incorporated the memorandum in his brief filed in this Court. All the arguments urged by the defendant have been considered and rejected. See the decisions cited in Spencer v. Commonwealth, 238 Va. 563, 568-69, 385 S.E.2d 850, 853-54 (1989); Watkins v. Commonwealth, 238 Va. ___, ___, 385 S.E.2d 50, 56-7 (1989); Buchanan v. Commonwealth, 238 Va. 389, 412-13, 384 S.E.2d 757, 771 (1989), cert. denied, ___ U.S. ___, 58 U.S.L.W. 3468 (1990); and Pope v. Commonwealth, 234 Va. 114, 121-22, 360 S.E.2d 352, 357 (1987), cert. denied, 485 U.S. 1015 (1988). We reaffirm our decisions in those cases.

B. Motion to Suppress

The trial court overruled the defendant's motion to suppress statements he had made to an officer in two interviews conducted prior to his arrest. Initially, he stated that, upon hearing a scream, he had entered the carpet store to find "a

white guy" with "long blond hair" who was "bending over" with "his pants pulled down" and a "lady . . . laying on the floor" alive but "bleeding through her mouth [and] nose". The white man fled, Mu'Min said, and the defendant "went out the [back] door." Abandoning that account later, the defendant acknowledged that he had entered the store to inquire about an oriental rug and had struck Mrs. Napwasky twice during a bitter quarrel over prices. In significant respects, Mu'Min's two statements were irreconcilably inconsistent. They were no more incriminating than his testimony at trial.

Attacking the trial court's ruling permitting selective portions of his extra-judicial statements to be read into evidence, the defendant contends that his statements were not voluntary because, he says, they were made while he was "incarcerated on a prior charge", while he "was tired and scared", and at a time when he was given no "opportunity to speak with legal counsel." He declares on brief that he "merely said what the Investigator wanted him to say in the misguided belief that the Investigator was going to help him."

> Admissibility of a defendant's statements is an issue to be decided by the [trial] court, which evaluates the credibility of the witnesses, resolves any conflicts in the testimony, and weighs the evidence as a whole. The court must decide whether the defendant knowingly and intelligently relinquished and abandoned his rights. The court's determination is a question of fact based upon the totality of the circumstances. This factual finding will not be disturbed on appeal unless plainly wrong.

Watkins v. Commonwealth, 229 Va. 469, 477, 331 S.E.2d 422, 429-30 (1985) (citations omitted), cert. denied 475 U.S. 1099 (1986).

A review of the transcript of a tape recording of the testimony at the suppression hearing discloses no evidence of coercion. The two interviews were conducted at appropriate hours by a single investigator, the officer fully, definitively, and repeatedly advised Mu'Min of each of his Miranda rights, and the defendant expressly waived those rights.

The defendant was qualified, both by training and experience, to make a knowing and voluntary waiver. Mu'Min, a graduate of a private "prep" school, had earned a college degree in business administration and was literate in four languages. In his testimony at the suppression hearing, he acknowledged that, in response to questions propounded to him by the investigator, he had agreed that he understood each element of the Miranda warnings, that he knew the interviews were being recorded, and that, because he had been represented by an attorney appointed to defend him at his 1973 murder trial, he was already aware that he was entitled to the advice of counsel. Nevertheless, he readily assented to the question whether he was "willing to talk . . . without consulting a lawyer or having a lawyer present."

We hold that the record completely supports the trial court's ruling denying the defendant's motion to suppress his extra-judicial statements.

C. Discovery

Prior to trial, Mu'Min filed a motion to require the Commonwealth to disclose "the factual basis" for a claim of future dangerousness, one of the statutory predicates for the death penalty. Specifically, he requested detailed information concerning evidence of prior convictions, unadjudicated criminal charges, psychological evaluations, and any threatening statements made by the defendant which the Commonwealth intended to introduce at the penalty trial. Defense counsel claimed that, without such information, "the possibility arises of trial by ambush".

The trial court granted the motion, and the Commonwealth complied with the defendant's request. The Commonwealth then moved for disclosure[2] of those "facts in mitigation defendant intends to introduce at the penalty phase". The Commonwealth's Attorney explained that "we are merely asking for the same thing as defense asked of the Commonwealth". Granting the Commonwealth's motion, the court stated that the purpose of discovery is "to prevent total surprise" and that discovery "runs [in] both directions".

On appeal, Mu'Min contends that the trial court infringed his due process rights by not limiting the Commonwealth's discovery rights to those granted expressly by Rule 3A:11(c) and

[2]It is of no consequence that both Mu'Min and the Commonwealth labelled their pleadings as motions for bills of particulars. The titles are irrelevant; judged by their substance, the two pleadings are motions for discovery.

Code § 19.2-264.3:1(D).[3] Assuming without deciding that, as Mu'Min argues, the trial court erred in granting the Commonwealth's motion, and assuming further that the error was not invited as the Attorney General contends, we hold that any such error was harmless beyond a reasonable doubt.[4]

The information the defendant disclosed was couched in broad generalizations. Indeed, Mu'Min's response to the discovery order contained little more than a routine recitation of the mitigating factors enumerated in Code § 19.2-264.4(B) and a reference to a "history of psychiatric evaluations". It did not contain the names of any potential witnesses or any other evidence Mu'Min intended to offer. Moreover, the transcript of proceedings at the penalty trial shows that the Commonwealth offered no evidence to rebut the testimony Mu'Min adduced as evidence in mitigation. The defendant cannot logically claim that he was prejudiced by a pre-trial order granting the Commonwealth's discovery motion when his response disclosed nothing which gave the Commonwealth an unfair advantage at trial.

[3]If Mu'Min's argument can be read as a claim to a right to surprise or "ambush" the Commonwealth, we reaffirm our recent holding that no such right exists. Bennett v. Commonwealth, 236 Va. 448, 459, 374 S.E.2d 303, 311 (1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1765 (1989).

[4]Although a mere violation of Rule 3A:11(c) or Code § 19.2-264.3:1(D) would not require this "more stringent standard" of harmless error review, see Dowling v. United States, ___ U.S. ___, ___, 110 S.Ct. 668, 671 (1990), we have applied that standard here because Mu'Min frames the issue in constitutional terms.

D. Jury Selection

1. Content Questions

In advance of trial, defense counsel submitted for approval a list of questions designed, in part, to determine what a prospective juror had seen, read, or heard about the case. Such questions are of a type characterized at bar as "content questions". The trial court refused to allow counsel to propound such questions, and Mu'Min argues on appeal that the court's refusal constituted "a denial of due process of law" and a violation of his right to "trial by an impartial jury".[5]

Sixteen of the 20 members of the jury panel had indicated on voir dire that they had acquired some information from the news media or from conversations with acquaintances. In reply to questions propounded, both by the court and by counsel during the course of an examination that consumed 172 pages of the

[5]Mu'Min also argues that the court's ruling "violated the express mandate of Code § 8.01-358". The defendant refers to the second paragraph of that statute which directs "[a] juror, knowing anything relative to a fact in issue, [to] disclose the same in open court." Construing that statute, we have said:

> A party has no right, statutory or otherwise, to propound any question he wishes, or to extend voir dire questioning ad infinitum. The court must afford a party a full and fair opportunity to ascertain whether prospective jurors "stand indifferent in the cause," but the trial judge retains the discretion to determine whether the parties have had sufficient opportunity to do so.

LeVasseur v. Commonwealth, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983), cert. denied, 464 U.S. 1063 (1984).

transcript, all members of the panel attested, collectively and in groups of four, that they had not formed any opinion based upon the information they had acquired, were not sensible of any bias or prejudice, could enter the jury box with an open mind, and were able to render a fair and impartial verdict based upon the law and the evidence admitted at trial.

We agree with the Attorney General that an opportunity to pose the kind of "content questions" the defendant proposed is not a matter of right. See United States v. Haldeman, 559 F.2d 31, 67-8 (D.C. Cir 1976) (en banc), cert. denied, 431 U.S. 933 (1977) (affirming trial court's rejection of "content questions" on voir dire related to pre-trial publicity). The information a person acquires about a case from others may or may not prove to be the facts of the case as developed by evidence admitted at trial. Such information may or may not induce a person to form an opinion before trial. Any opinion formed before trial may or may not affect a person's ability as a juror to reach a different conclusion at trial.

Of course, parties litigant may properly inquire whether a prospective juror has acquired information about the case before trial. It does not follow that litigants have a constitutional right to know what that information is. They are entitled to know only whether the prospective juror, in reliance upon the information acquired, has formed an opinion and, if so, whether the juror can yet "stand indifferent in the cause". Code § 8.01-358; L.E. Briley v. Commonwealth, 222 Va. 180, 184-87, 279 S.E.2d 151, 154-55 (1981).

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 723 (1961) (citations omitted). Quoting and applying this rule in a later case, the Supreme Court upheld the seating of a juror who had said on voir dire, "My experience of [the accused] is such that right now I would find him guilty." Murphy v. Florida, 421 U.S. 794, 802 n.5 (1975).

Here, none of the members seated on the panel had formed an opinion based upon the information acquired before trial, and all had affirmed on oath that they could stand indifferent in the cause. We hold, therefore, that the trial court did not err in disallowing the content questions proposed by the defendant.

2. Seating Two Jurors

Renewing objections raised during voir dire, Mu'Min moved to strike two jurors for cause. On appeal, he contends that the trial court erred in overruling his motions to strike Alexandria Santiago, a prospective alternate, and Gregory Dailey. He argues that Ms. Santiago was not impartial because, he says, she "had patronized Dale City Floors" and referred during voir dire to Mrs. Napwasky "by her first name".

The transcript shows that Ms. Santiago had said that she "knew Gladys", that their relationship had been "friendly", but that "we weren't friends." In reply to questions put by defense

counsel, she affirmed that her contacts with the victim did not "cause [her] to form an opinion", that she was not "aware of any bias or prejudice", and that she was "able to render a fair and impartial verdict and set aside [her] knowledge of Mrs. Napwasky".

Mu'Min challenges the seating of Mr. Dailey on the ground that "his deliberations would [have been] hampered and rushed by the financial hardship caused by jury service in a lengthy case." According to the record before us, Mr. Dailey made no plea of personal financial hardship. Asked what hardship his service on the jury would cause, he said, "I'm doing telephone communications, and the company I work for is very small and it would jeopardize their business right now." This, he believed, could make him feel "rushed" and "could somewhat hamper" his ability as a juror to deliberate.

Under Code § 8.01-341.2, a person's duty to serve on a jury may be deferred or limited "if serving on a jury . . . would cause such a person a particular occupational inconvenience." The privilege, one the statute makes available at the discretion of the trial court, is purely personal to the prospective juror and altogether unrelated to the inconvenience suffered by the person's employer.

We find no merit in these assignments of error. Every question contemplated by Code § 8.01-358 and required by Rule 3A:14 was addressed to these prospective jurors by court and counsel. Every response Santiago and Dailey made fully supports

the trial judge's conclusion that both were qualified to sit on the jury, and we will uphold his rulings.[6]

III. GUILT TRIAL ISSUES

A. Evidentiary Rulings

One of the elements of one of the forms of the offense charged in the indictment was the status of the accused at the time the offense was committed, i.e., that he was then "a prisoner confined in a state or local correctional facility".[7] Code § 18.2-31(c). As proof of Mu'Min's status, the Commonwealth offered in evidence at the guilt trial a copy of

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[6]On brief, Mu'Min also complains generally that "[t]he trial court's voir dire . . . was essentially limited to inquiry whether a juror's views [concerning capital punishment] would prevent, not substantially impair, choosing one punishment or the other." Although the defendant had raised an objection on this ground during voir dire, he failed to object to the seating of any juror on that ground. Applying Rule 5:25 in a similar procedural context, we have refused to consider a challenge to a death-qualifying question. "If a party objects to rulings made during the voir dire of a prospective juror, but subsequently fails to object to the seating of that juror, the party has waived the voir dire objections." Spencer v. Commonwealth, 238 Va. 295, 306, 384 S.E.2d 785, 793 (1989). We apply that rule to Mu'Min's complaint.

[7]Defining this term, the trial court instructed the jury as follows:

> An inmate of a state correctional facility remains an inmate at all times until he is released from that status by the proper state authority. An inmate who escapes from custody retains the status of inmate during the entire course of such an unauthorized absence.

This is a correct statement of the law in this Commonwealth. See Ruffin v. Commonwealth, 62 Va. (21 Gratt) 790, 793-94 (1871); see also Jefferson v. Commonwealth, 214 Va. 747, 752, 204 S.E.2d 258, 262 (1974).

the order of conviction of first degree murder entered against Mu'Min in 1973. In keeping with its ruling against a motion that defense counsel had made in limine, the trial court admitted the order over the defendant's objection. On appeal, the defendant argues that evidence of prior crimes is inevitably prejudicial and that references the Commonwealth's Attorney made in the presence of the jury to the facts disclosed by that order compounded the prejudice. Accordingly, the defendant maintains that the trial court's rulings constituted reversible error. We do not agree.

A transcript of Mu'Min's interview with the investigator in which, eventually, he confessed his assault upon Mrs. Napwasky was read to the jury. As the following excerpt reveals, the defendant initiated several references to his prior conviction and to the sentence imposed.

> WATSON: You tried to wipe off your fingerprints?
>
> MU'MIN: Wipe my fingerprints off.
>
> WATSON: Why did you do that?
>
> MU'MIN: Because I'm a convicted murderer.
>
> * * *
>
> WATSON: Why didn't you come forward with this story earlier?
>
> MU'MIN: Because I'm a convicted murderer.
>
> * * *
>
> MU'MIN: I know what you're -- it's the same thing back in '73 . . . . When I got this murder charge I was sitting home. My aunt and my uncle both in the house, testified that I was home when a shot was fired, but because of certain physical evidence that

they picked up, they had similarities and someone who said that he thought he saw me by the way someone walked, I've been sitting in the penitentiary since this, since this '73 incident, the last 15 years . . . .

* * *

MU'MIN: I mean how can it -- that look, you know, how can that look good for me? I'm a convicted murderer.

WATSON: Think about it.

MU'MIN: Serving a 48 year sentence.

These several references, integral parts of a confession we have found to be voluntary, were competent evidence. See Boggs v. Commonwealth, 229 Va. 501, 517, 331 S.E.2d 407, 419 (1985), cert. denied 475 U.S. 1031 (1986); Bowman v. Commonwealth, 174 Va. 461, 463, 5 S.E.2d 497, 498-99 (1939). We hold, therefore, that error, if any, resulting from the trial court's rulings concerning the 1973 order of conviction was rendered harmless by the defendant's own account of the same facts disclosed by that order. See Schindel v. Commonwealth, 219 Va. 814, 817, 252 S.E.2d 302, 304 (1979) (hearsay error rendered harmless by defendant's "own testimony corroborating the factual details").

Challenging another evidentiary ruling, Mu'Min argues that the trial court erred in excluding from the evidence a copy of a VDOT departmental regulation. The defendant offered the document to show that a VDOT employee assigned to supervise his work crew had not taken an oath as a peace officer as required by the regulation and, hence, that at the time the victim was killed, he was not "a prisoner . . . in the custody of an

employee [of a correctional facility]" within the contemplation of Code § 18.2-31(c).

We need not consider this issue. The jury finding in the language of § 18.2-31(c) was only one of the bases for the guilty verdict. The jury also rested its verdict upon its finding in the language of § 18.2-31(d) that Mu'Min committed the killing "during the commission of robbery while . . . armed with a deadly weapon." Consequently, the issue raised on appeal is moot. Cf. Zant v. Stephens, 462 U.S. 862 (1983) (death penalty upheld although one of three statutory aggravating circumstances subsequently declared invalid); accord Poyner v. Commonwealth, 229 Va. 401, 427, 329 S.E.2d 815, 830, cert. denied, 474 U.S. 888 (1985); Tuggle v. Commonwealth, 230 Va. 99, 110, 334 S.E.2d 838, 845 (1985), cert. denied 478 U.S. 1010 (1986); Stout v. Commonwealth, 237 Va. 126, 134, 376 S.E.2d 288, 292, cert. denied, __ U.S. ___, 109 S.Ct. 3263 (1989).

B. Jury Instructions

The defendant assigns error to the trial judge's rulings refusing four instructions relating to Mu'Min's contention that he was not a prisoner within the intendment of Code § 18.2-31(c) and his ruling granting the Commonwealth's instruction to the contrary (see footnote 5 supra). For the reason just stated, we need not address these assignments of error.

Mu'Min also questions another ruling on another instruction granted by the trial court. Instruction number 1 defined capital murder in terms of the three statutory definitions charged in the indictment and the elements of the

lesser-included offenses of first and second degree murder and voluntary manslaughter. The defendant believes that the instruction defined first degree murder and the standard of proof incorrectly and that the trial court erred in refusing his substitute draft.

In pertinent part, instruction number 1 told the jury that if they failed to find any of the three predicates for capital murder,

> but find that the Commonwealth has proved beyond a reasonable doubt:
>
> (1) That the defendant killed Gladys Napwasky; and
>
> (2) That the killing was malicious; and
>
> (3) That the killing was willful, deliberate and premeditated,
>
> then you shall find him guilty of first degree murder. . . .

We find no error in this instruction. Indeed, we see no material difference between this definition and that of the substitute draft, and we reject the defendant's complaint.

IV. PENALTY TRIAL ISSUES

A. Passion or Prejudice

Whenever the death penalty is imposed, this Court is required to review the record to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor". Code § 17-110.1(C)(1). The defendant claims that the trial court committed error by refusing the jury's request for a definition of the particulars of a life sentence. We disagree. Rejecting

a similar claim in an earlier capital case, we said that the jury's question actually "tends to show that the jury's deliberations were dispassionate, unprejudiced, and guided by earnest consideration of every factor relevant to the portentous decision they were required to make." Delong v. Commonwealth, 234 Va. 357, 370, 362 S.E.2d 669, 676 (1987), cert. denied, 485 U.S. 929 (1988).

The defendant also suggests that the jury's penalty decision was the result of some "other arbitrary factor". The defendant offered in evidence at the penalty trial a copy of a departmental regulation providing that "[a] prisoner . . . shall not be left without supervision at any time." In response to the Commonwealth's objection, the trial judge said, "I question the relevancy . . . ." The defendant urges us to commute the sentence of death on the ground that the judge's comment influenced the jury "to disregard a major component of the defendant's evidence in mitigation."

For two reasons, we decline to do so. First, the transcript shows that the judge's comment was made to the attorneys in a side-bar conference. Having in mind the purpose of such a conference, we think it is unlikely that the comment was heard by the jury. Second, even if the comment was overheard, the trial court's decision to overrule the Commonwealth's objection and admit the document for the jury's consideration cured any prejudice the comment may have caused.

Having conducted a thorough review of the voluminous record of both phases of the trial, we find nothing to show that the

penalty imposed by the jury and confirmed by the trial court was the product of passion, prejudice, or other arbitrary factor.

B. Propriety of the Sentence

As required by Code § 17-110.1(C)(2), we must now determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

1. Excessiveness

A death penalty is inherently excessive unless it is based upon what has come to be known as the "dangerousness predicate" or the "vileness predicate". Code § 19.2-264.4(C) provides:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

Tracking the language of the statute as incorporated in the court's instruction number 1, the jury's verdict based the death penalty upon both predicates.

The defendant challenges the jury's finding of the vileness predicate because, he says, the Commonwealth's Attorney failed "to include torture in his bill of particulars" and "the

evidence . . . did not establish torture."[8] We think the evidence of the multiple, grievous wounds inflicted upon Mrs. Napwasky was sufficient to prove torture, see Tuggle v. Commonwealth, 228 Va. 493, 516, 323 S.E.2d 539, 553 (1984), vacated and remanded on other grounds, 471 U.S. 1096 (1985) ("torture" correctly included in vileness instruction where evidence was sufficient to show victim, "[w]hile still alive, . . . was severely bruised and bitten on her breast"). However, it is immaterial that the jury instruction and the jury's verdict contained the word "torture" when the bill of particulars did not. It is immaterial because, as defined in Code §§ 19.2-264.2 and -264.4(C), "the term 'vileness' includes three separate and distinct factors, with proof of any one factor being sufficient to support a finding of vileness and hence a sentence of death." Bunch v. Commonwealth, 225 Va. 423, 442, 304 S.E.2d 271, 282, cert. denied, 464 U.S. 977 (1983).

The autopsy report identified 16 cuts and puncture wounds on the victim's face, neck, chest, and left arm and numerous blunt-force injuries to the face and forehead. Clearly, the evidence was sufficient to prove an "aggravated battery", i.e., "a battery which, qualitatively and quantitatively, is more

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[8] In another argument advanced on brief, Mu'Min says that "the sentence of death is excessive" because, had the government "exercised rudimentary care in supervision of the defendant, this crime would not have been committed." In effect, the defendant argues that an escapee who commits murder is entitled to immunity from the death penalty for his intrepidity in escaping supervision. We are unpersuaded.

culpable than the minimum necessary to accomplish an act of murder." M. Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), cert. denied, 441 U.S. 967 (1979). Indeed, a single stab wound may, under certain circumstances, be sufficient to satisfy this definition. See, e.g., Stout v. Commonwealth, 237 Va. at 132-33, 376 S.E.2d at 291-92; Edmonds v. Commonwealth, 229 Va. 303, 313, 329 S.E.2d 807, 814, cert. denied, 474 U.S. 975 (1985).

In light of the "evidence of the prior history of the defendant [and] of the circumstances surrounding the commission of the offense", Code § 19.2-264.4(C), we think the jury was entirely justified in finding that the defendant "would constitute a continuing serious threat to society", id. We need not recite the details of that evidence. It is enough that we have found proof of the vileness predicate sufficient to support the imposition of the death penalty. "When a jury makes separate findings of specific statutory aggravating circumstances, any of which could support a sentence of death, and one of the circumstances subsequently is invalidated, the remaining valid circumstance, or circumstances, will support the sentence." Tuggle v. Commonwealth, 230 Va. at 110, 334 S.E.2d at 845, quoted with approval in, Stout v. Commonwealth, 237 Va. at 134, 376 S.E.2d at 292.

2. Disproportionality

Code § 17-110.1(C)(2) requires us to compare the case under review with "similar cases" in making our determination whether "the sentence of death is excessive or disproportionate". To

facilitate that comparison as directed in § 17-110.1(E), we have accumulated the records in all capital murder cases to come before this Court (including those in which the penalty imposed was a life sentence) and stored and indexed those records apart from those in all other criminal cases. In selecting cases from that inventory for purposes of our comparison, we give special attention to those in which the death penalty was based upon the same statutory predicate (or predicates) as that underlying the penalty under review.

The cases in which the death penalty was based, as it was here, upon both the "future dangerousness" predicate and the "vileness" predicate are collected and annotated in our recent opinion in Spencer v. Commonwealth, 238 Va. 295, 319-20, 384 S.E.2d 785, 799-800 (1989). See also R. Smith v. Commonwealth, 239 Va. ___, ___ S.E.2d ___ (1990). We have compared the records in those cases with that in the case at bar, and we are satisfied that "juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes." Stamper v. Commonwealth, 220 Va. 260, 284, 257 S.E.2d 808, 824 (1979), cert. denied, 445 U.S. 972 (1980).

V. INEFFECTIVE ASSISTANCE OF COUNSEL

By counsel appointed specially, Mu'Min charges that his trial lawyer was ineffective because he failed at the penalty trial to submit certain instructions and to object to several instructions as well as to the verdict form approved by the trial court. These failures, he says, are patently prejudicial and unjustifiable by any acceptable explanation. In Beaver v.

Commonwealth, 232 Va. 521, 352 S.E.2d 342, cert. denied, 483 U.S. 1033 (1987), we rejected just such a claim.

> Defendant complains of errors of omission committed by his trial counsel. Yet the record contains no testimony from trial counsel concerning his alleged acts of omission. Were we to attempt to dispose of defendant's contentions on this record, we would be called upon to declare the work of an attorney to be ineffective without that attorney having an opportunity to explain his conduct. [citation omitted.]
>
> The defendant argues, however, that though the record does not contain everything that relates to the question of ineffective assistance of counsel, it contains enough to establish that trial counsel failed to do things that obviously should have been done and for which there can be no acceptable explanation. However, [Code § 19.2-317.1] does not say that we can proceed where there is partial evidence of ineffectiveness. The statute presupposes a full record on the very issue that is the basis for the claim of ineffective assistance of counsel. We conclude, therefore, that defendant's claim of ineffective assistance of trial counsel cannot be raised in this appeal.

Id. at 537-38, 352 S.E.2d at 351-52.

Applying the qualifying language of Code § 19.2-317.1,[9] we remain committed to our previous rulings. Trial counsel will not be exposed to the possibility of professional disgrace without "an opportunity to defend himself on the record by

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[9]Code § 19.2-317.1 provides:

> A claim of ineffective assistance of counsel may be raised on direct appeal if assigned as error and if all matters relating to such issue are fully contained within the record of the trial.

giving the rationale for his challenged acts of omission or commission". Correll v. Commonwealth, 232 Va. 454, 470, 352 S.E.2d 352, 362, cert. denied, 482 U.S. 931 (1987); accord Frye v. Commonwealth, 231 Va. 370, 400, 345 S.E.2d 267, 287-88 (1986). See R. Smith, 239 Va. at ___ n. 6, ___ S.E.2d at ___ n. 6. Mu'Min's claim of ineffective assistance of counsel cannot be considered in this appeal.

VI. CONCLUSION

Finding no reversible error in the conduct of either phase of the bifurcated trial and no cause to commute the death sentence, we will affirm the judgment confirming the jury's two verdicts.

Affirmed.

Justice Whiting, with whom Justice Stephenson and Justice Hassell join, dissenting.

DAVID MAJID MU'MIN A/K/A
DAVID MICHAEL ALLEN

v. Record No. 890899

COMMONWEALTH OF VIRGINIA

Justice Whiting, with whom Justices Stephenson and Hassell join, dissenting.

I cannot agree that the trial court correctly excluded all of the questions intended for the 16 prospective jurors who said they had acquired pretrial information about the offense. A trial court's assessment of prospective jurors' potential for bias is presumptively correct, Patton v. Yount, 467 U.S. 1025, 1036 (1984); Pope v. Commonwealth, 234 Va. 114, 124, 360 S.E.2d 352, 358 (1987), absent manifest error, Patton, 467 U.S. at 1031-32 n.7; Irvin v. Dowd, 366 U.S. 717, 723 (1961); Pope, 234 Va. at 124, 360 S.E.2d at 358. In this case, however, I believe there was "manifest error" in refusing to permit any of the questions necessary to establish a factual and objective basis for assessing juror impartiality.

The record discloses an unusual amount of pretrial publicity. The charge involved the alleged capital murder of a local resident by a convict who was serving a part of his sentence for first degree murder as a member of a road gang. After this murder, county officials and local citizens publicly expressed surprise, outrage, and fear for the safety of local residents upon discovery that prisoners like Mu'Min, who had been convicted of violent crimes, were permitted to work in such close contact with the public.

When the prospective jurors were assembled, 16 of them responded affirmatively to the question of whether they had "acquired any information from the news media or from any other source" regarding the offense. The trial court then asked:

> Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?
>
> Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?
>
> . . . .
>
> In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired in this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

Only one prospective juror responded to these inquiries; the balance remained silent. That prospective juror was excused for cause when he said he could not be impartial.

Because of the trial court's ruling, we do not know what the prospective jurors had read or heard about the case before trial. We do know, however, that the following information regarding the accused, not a part of the evidence at the guilt phase of trial, was published in the local papers:

1. His suspected assault upon a fellow prisoner, resulting in a broken nose.

2. His citation for 23 prison violations and his rejection for parole on six previous applications.

3. His 1973 conviction for the murder and robbery of a Grayson County cab driver, with some details of the crime and a statement from the Grayson County prosecutor that the death penalty was not available when the accused was convicted.

4. His juvenile record in New York and Virginia.

5. His alleged commission of a burglary and engagement in "Peeping Tom" activities while a prisoner.

Also, there were indications that a rape may also have been involved in the commission of this murder.

An accused has statutory and constitutional rights to trial by an impartial jury. I do not believe that defense counsel was afforded a meaningful voir dire examination of prospective jurors, as mandated by Code § 8.01-358. The majority disposes of this contention in a footnote (n.3) by relying upon LeVasseur v. Commonwealth, where we said that "[a] party has no right, statutory or otherwise, to propound any question he wishes, or to extend voir dire questioning ad infinitum." 225 Va. at 581, 304 S.E.2d at 653. Nothing in the record in the present case, however, suggests that defense counsel sought to "propound any question he wishe[d], or to extend voir dire questioning ad infinitum."

Code § 8.01-358 mandates that "counsel for either party shall have the right to examine under oath any person who is called as a juror . . . and shall have the right to ask such person . . . directly any relevant question to ascertain

whether he . . . is sensible of any bias or prejudice." The section further provides that "[a] juror, knowing anything relative to a fact in issue, shall disclose the same in open court." Code § 8.01-358. Moreover, as we said in LeVasseur, "[t]he court must afford a party a full and fair opportunity to ascertain whether prospective jurors 'stand indifferent in the cause.'" 225 Va. at 581, 304 S.E.2d at 653.

In enacting Code § 8.01-358, the General Assembly intended to provide counsel a meaningful voir dire examination. Clearly, questions pertaining to what a prospective juror had seen, read, or heard about the case are "relevant . . . to ascertain whether he . . . is sensible of any bias or prejudice." Therefore, the court violated Mu'Min's statutory right to trial by an impartial jury.

Additionally, "[u]nder the Federal and State Constitutions, U.S. Const. amends. VI and XIV; Va. Const. art. 1, § 8, an accused has a right to trial by an 'impartial jury.'" Wm. Patterson v. Commonwealth, 222 Va. 653, 658, 283 S.E.2d 212, 215 (1981). As illustrated by the majority opinion, ___ Va. at ___, we frequently apply federal decisions construing the Sixth Amendment right to an impartial jury in construing this same right under art. 1, § 8 of the Virginia Constitution. See also, Mackall v. Commonwealth, 236 Va. 240, 251, 372 S.E.2d 759, 766 (1988), cert. denied, 109 S. Ct. 3261 (1989).

An accused's right to trial by an impartial jury is violated if jurors are impanelled after an inadequate voir dire examination. See, e.g., Turner v. Murray, 476 U.S. 1 (1986). If the examination is inadequate, the accused's right is prejudiced in two respects; he is unable to exercise effectively his right of challenge, United States v. Dellinger, 472 F.2d 340, 368 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973), and the trial court is unable to assess fairly the prospective jurors' impartiality. United States v. Davis, 583 F.2d 190, 197-98 (5th Cir. 1978).

Thus, when there has been unusual pretrial publicity in a criminal case, the Supreme Court has said that there must be "fair support in the record for the state courts' conclusion that the jurors . . . would be impartial." Patton, 467 U.S. at 1038. Moreover, where prospective jurors have indicated that they were exposed to pretrial publicity in response to questions similar to those posed in this case, we have warned: "[T]he proof that [a prospective juror] is impartial and fair, should come from him and not be based on his mere assent to persuasive suggestions." Breeden v. Commonwealth, 217 Va. 297, 300, 227 S.E.2d 734, 736 (1976) (emphasis added) (citations omitted).

In other words, "in the absence of an examination designed to elicit answers which provide an objective basis for the court's evaluation, 'merely going through the form of obtaining jurors' assurances of impartiality is insufficient . . . .'" Silverthorne v. United States, 400

U.S. 627, 638 (9th Cir. 1968) (emphasis added) (citations omitted). In at least two of our cases involving pretrial publicity, we have said that a trial court should have rejected such subjective assurances. Justus v. Commonwealth, 220 Va. 971, 977, 266 S.E.2d 87, 91 (1980); Breeden, 217 Va. at 298-300, 227 S.E.2d at 736-37. "[H]owever willing the juror might be to trust himself, the law will not trust him." Breeden, 217 Va. at 298, 227 S.E.2d at 735 (citations omitted).

Accordingly, whether a juror can impartially render a verdict "should not be [based] on that juror's [subjective] assessment of self-righteousness without something more." Silverthorne, 400 F.2d at 639. Instead, a trial court must objectively and independently assess each prospective juror's state of mind.

> When a juror is exposed to potentially prejudicial pretrial publicity, it is necessary to determine whether the juror can lay aside any impression or opinion due to the exposure. The juror is poorly placed to make a determination as to his own impartiality. Instead, the trial court should make this determination.

Jordan v. Lippman, 763 F.2d 1265, 1274 (11th Cir. 1985) (emphasis added) (citation omitted). "The issue of who is, or is not, a competent juror is one for the trial court to decide," Justus, 220 Va. at 976, 266 S.E.2d at 91, not the juror himself.

Furthermore, I believe the questions in this case were deficient in that the prospective jurors could simply remain silent as an implied indication of a lack of bias or prejudice. This gave the trial court no effective

opportunity to assess the demeanor of each prospective juror in disclaiming bias. Moreover, even if the court had required an express affirmation of each prospective juror, such an affirmation would have required an admission of bias or prejudice before the assembled panel. "No doubt each juror was sincere when he said that he would be fair and impartial to the [accused], but the psychological impact requiring such a declaration before one's fellows is often its father." Irvin, 366 U.S. at 728.

Apparently, we have never addressed the necessity of such questions at voir dire, where panel members have been exposed to unusual pretrial publicity. However, we have ample precedent for such questions. In Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414 (1974), the trial court sought a description of what was actually remembered by those prospective jurors who had been subjected to pretrial publicity. There, we sustained the trial court's objective findings regarding the impartiality of those prospective jurors, who we noted had remembered few of the details of such publicity. Id. at 717, 204 S.E.2d at 420. Although not the subject of our discussion, an inspection of the appendices in the following cases indicates that "content" questions were likewise asked of prospective jurors exposed to pretrial publicity. Mackall v. Commonwealth, 236 Va. 240, 372 S.E.2d 759 (1988); LeVasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 644 (1983), cert. denied, 464 U.S. 1063 (1984); Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981), cert. denied, 456 U.S. 938

(1982); Justus, 220 Va. 971, 266 S.E.2d 87; Breeden, 217 Va. 297, 227 S.E.2d 734; Greenfield, 214 Va. 710, 204 S.E.2d 414.

The questions proffered by the accused,[1] and refused by the court, were clearly designed to provide a factual and objective basis for assessing the potential for bias.[2] Some prospective jurors may honestly have felt that the publicity had not affected their impartiality; however, a disclosure of what was actually remembered could lead an impartial observer to conclude that there was a bias of which the potential juror was unaware, as in Justus and Breeden. "Voir dire examination serves to protect [the right to a fair trial] by exposing possible biases, both known and unknown, on the part of potential jurors." McDonough Power Equipment v. Greenwood, 464 U.S. 548, 554 (1984).

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[1]The tenor of the proffered questions was: What have you seen, read or heard about this case; from whom did you get this information; when and where did you get this information; have you discussed this case with anyone; with whom; when and where; what did you discuss; if an opinion had been formed, what is it; has anyone expressed an opinion about this case to you; who; what; when; and where?

[2]Without necessarily approving each of the proffered questions, if the trial court permits no questions regarding the source and extent of exposure of pretrial questions, and, therefore, content questions are necessary, at minimum, I believe each prospective juror subjected to pretrial publicity should have been asked what information he recalled and when it was received. Moreover, the risk of "tainting" the other prospective jurors could have been minimized by excluding the others from the courtroom during each examination, or by examining them in smaller groups, as the court did.

I believe that the majority's citation of United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), for the proposition that the opportunity to ask "content questions" is "not a matter of right," misconstrues the essence of that holding. The Haldeman Court explicitly agreed that a certain ABA Standard "mandate[d] an inquiry into the sources and intensity of a venireman's exposure to pretrial publicity, not an inquiry into his recollection of the content of that publicity." Id., at 69 (emphasis added). Moreover, emphasizing that the voir dire in that defendant's case permitted counsel to determine the nature and intensity of the exposure to pretrial publicity, the Court stated:

> We agree that it would have been reversible error for the Court to accept jurors simply because they said they would be fair . . . . In this case, however, the Court had before it and acted on not only the jurors' subjective assurances but also objective information relating how closely they had followed Watergate and their sources of information.

Id., at 67 n.51 (citations omitted) (emphasis added). In addition, Haldeman distinguished Dellinger and Silverthorne, two cases involving constitutionally inadequate voir dire, on the ground that the trial courts in those cases failed to permit any questions concerning the source and intensity of exposure to pretrial publicity. See id. at 69.

As in Dellinger and Silverthorne, the trial court in this case rejected all voir dire questions aimed at determining the source and intensity of exposure to pretrial publicity, as well as "content" questions. In my view, it

was not necessarily error to preclude some or even all of the "content" questions; however, the trial court's conduct of voir dire was constitutionally inadequate, even under Haldeman, in its blanket refusal to permit any questions aimed at determining the sources and intensity of exposure to pretrial publicity (e.g., where did you hear about this case; how many times did you hear about it; and when did you hear about it).

In my opinion, under the circumstances of this case, the refusal to permit any questions regarding the source and intensity of knowledge regarding pretrial publicity violated the accused's statutory and constitutional right to trial by an impartial jury. Although I agree with the majority opinion in all other respects, I would reverse the judgment of the trial court and remand the case for a new trial at which appropriate voir dire questions should be asked.